SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 949.

J. N. EVANS, PLAINTIFF IN ERROR,

vs.

SAMUEL BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

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1 In the district court, 2nd district, State of Nevada, county of Washoe.

SAMUEL BROWN, PLAINTIFF,
v.
J. NEWTON EVANS, DEFENDANT.

The plaintiff above named complains of the defendant above named, and for cause of complain alleges:

That heretofore, to wit, on the 30th day of March, A. D. 1881, at the said county of Washoe, the said defendant did unlawfully, brutally, and without provocation, assault and beat this plaintiff, and did then and there, with a deadly weapon, to wit, an iron shovel, knock plaintiff down to and upon the ground, and did then and there, with his clenched fists, strike, beat, wound, and bruise this plaintiff, by means whereof plaintiff then and there became unconscious, and so remained for, to wit, more than one hour, and by means whereof, to wit, said beating, wounding, and bruising by said defendant, with his clenched fists and with said iron shovel,
2 plaintiff's head was cut and lacerated, and plaintiff's face was cut, and his nose broken, and the bones of both of plaintiff's cheeks were thereby then and there broken, and plaintiff's upper jaw was broken, and plaintiff did then and there, by means of said beating, sustain other and serious injuries; that by reason of all said injuries plaintiff's life was seriously imperilled, and for a long time thereafter, to wit, for the space of five weeks, plaintiff was confined to his bed, during all which time plaintiff suffered great pain and anguish of body, and during all which time plaintiff was wholly unable to aid or assist himself in any manner whatsoever, but required during all said time the constant care and attention of nurses to wait upon him; that plaintiff still suffers, and believes that for a long time to come he will continue to suffer great pain and anguish of body, and that plaintiff is still unable, and believes that for a
3 long time to come he will continue to be wholly unable, to engage in any employment or to attend to his (plaintiff's) business, in consequence of the said injuries so sustained by plaintiff as aforesaid. That ever since plaintiff was beaten as aforesaid he has been and still is unable, by reason of the injuries he then and there sustained by reason of said beating, to partake of any food except fluids; that plaintiff has been forced and obliged to pay, lay out, and expend divers large sums of money in and about the healing and curing of the wounds, bruises, and injuries so sustained by plaintiff as aforesaid, to wit, the sum of ($300) three hundred dollars for physicians who waited upon and attended plaintiff in and about the healing and curing him of his said injuries, and the sum of ($71.50) seventy-one dollars and $\frac{50}{100}$ to nurses who waited upon and attended plaintiff during the time he was rendered and made helpless as aforesaid, and the sum of ($29.37) twenty-nine dollars and $\frac{37}{100}$ for medicines
4 used by plaintiff in and about the healing and curing of said injuries; that plaintiff's time in and about his business is of the value of, to wit, $250 per month; that by reason of the premises aforesaid, and the wounding, beating, and bruising of plaintiff by defendant, as aforesaid, plaintiff has been damaged in the sum of twenty thousand dollars:

Wherefore plaintiff demands judgment against said defendant for the sum of twenty thousand dollars damages, and for costs of suit herein.

LINDSAY & DICKSON,
Attorneys for Plaintiff.

STATE OF NEVADA,
County of Washoe, ss:

Samuel Brown, being duly sworn, deposes and says that he is the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and that as to those matters he believes it to be true.

5 SAM'L BROWN.

Subscribed and sworn to before me this 17th day of May, A. D. 1881.
[NOTARIAL SEAL.] H. L. FISH,
Notary Public.

(Endorsed:) No. 1880. In the district court of the 2nd judicial district of the State of Nevada in and for the county of Washoe. Samuel Brown, plaintiff, vs. J. Newton Evans, defendant. Complaint. Filed May 18th, 1881. R. S. Osburn, clerk. Lindsay & Dickson, attorneys for plaintiff. Filed Sept. 8, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

6 In the district court of the second judicial district, State of Nevada, in and for the county of Washoe.

The State of Nevada, sends to J. Newton Evans, greeting:

You are hereby required to appear in an action commenced against you, as defendant, by Samuel Brown, plaintiff, in the district court of the second judicial district in and for the county of Washoe, State of Nevada, and answer the complaint therein within ten days after the service on you of this summons (exclusive of the day of service), if served in said county, or twenty days if served out of said county, but within said district, and in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to recover judgment against you for the sum of twenty thousand dollars damages for that as is alleged in the complaint on file herein on the 30th day of August, 1881, at the said county of Washoe, you, said defendant, brutally and without provocation, did assault and beat plaintiff with an iron shovel and with your clenched fists, by means whereof plaintiff became unconscious and so remained for, to wit, one hour; that thereby plaintiff received great bodily injuries more fully set forth and described in plaintiff's said complaint, and for that thereby and by reason of said beating and said bodily injuries and expenses incurred in and about the being healed and cured of said injuries, plaintiff sustained damages in the sum of twenty thousand dollars. A certified copy of said complaint is hereto attached and herewith served, all of which will more fully appear from the complaint which is on file in the office of the clerk of said court at Reno, in said county. And you are further notified that if you fail to appear and answer the said complaint the said plaintiff will apply to the court for the relief demanded.

In testimony whereof we have hereunto set our hands this 18th day of May, A. D. 1881.

LINDSAY & DICKSON,
Attorneys for Plaintiff.

6½ *Sheriff's return.*

STATE OF NEVADA,
County of Washoe, ss:

I hereby certify that I received the within summons on the 18th day of May, A. D. 1881, and that I personally served the same upon the within named defendant, J. N. Evans, by showing the original summons to him, and delivered to him a copy of the same in Washoe County, State of Nevada, on the 19th day of May, A. D. 1881, and I further return that I delivered the said J. N. Evans a certified copy of the complaint in said within action, with a copy of the summons attached, at the same time and place.

Dated this 19th day of May, A. D. 1881.

W. A. WALKER,
Sheriff of Washoe County, State of Nevada.
By I. CHAMBERLAIN,
Deputy.

(Indorsed:) No. 1880. Second judicial district court in and for Washoe County. Sam'l Brown, plaintiff, vs. J. Newton Evans, defendant. Summons. Returned and filed May 19, A. D. 1881. R. J. Osburn, clerk, by W. S. Knox, deputy. Lindsay and Dickson, plaintiff's attorneys. Filed Sept. 8, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

7 2d district court of Nevada in and for Washoe County.

SAM'L BROWN, PLAINTIFF,
vs.
J. N. EVANS, DEFENDANT.

Defendant is hereby granted ten days' additional time, or until 10th of June, 1881, in which demur or answer to the complaint on file in above cause by virtue of this stipulation.

(Signed) LINDSAY & DICKSON,
Plff's Atty's.

(Endorsed:) 2d district court of Nevada, Washoe County. Sam'l Brown, pl'ff, vs. J. N. Evans, def't. Stipulation filed June 9th, 1881. R. S. Osburn, clerk, by W. S. Knox, deputy. Filed Sept. 8, 1881. T. J. Edwards, clerk U. S. circuit court, dist. Nevada.

8 In the district court of the second judicial district of Nevada in and for the county of Washoe.

SAM'L BROWN, PLAINTIFF,
vs.
J. N. EVANS, DEFENDANT.

Now comes the defendant J. N. Evans, and for answer to complaint of Samuel Brown denies and avers as follows, to wit:

Defendant denies that on the 30th day of March, 1881, or at any time, defendant did unlawfully, brutally, and without provocation or otherwise, except as hereinafter specified and admitted, assault and beat the plaintiff.

Defendant denies that at the time and place alleged, or at any time or place, he did with a deadly weapon, or an iron shovel, or with any weapon or instrument strike plaintiff or knock plaintiff down.

9 Defendant denies that he struck, beat, wounded or bruised the plaintiff in the manner alleged in the complaint or at all except as hereinafter specially admitted.

Defendant denies that by reason of the alleged beating, striking, and wounding the plaintiff became or was unconscious.

Defendant denies that by reason of said alleged beating, wounding, and bruising or any wounding, beating, or bruising by defendant with his clenched fists, and with said iron shovel, plaintiff's head was cut and lacerated, or plaintiff's face was cut, or his nose broken, or the bones of both or either of plaintiff's cheeks were broken, or plaintiff's jaw was broken.

Defendant denies that by reason of said alleged beating plaintiff sustained other or serious injuries.

Defendant denies that by reason of said alleged injuries or any injuries caused or produced by defendant, plaintiff's life was seriously or otherwise imperilled, or that plaintiff for the space of five weeks or for any time was

10 confined to his bed, or that plaintiff suffered great pain or anguish of body, or that pl'ff was unable to assist himself, or that pl'ff required the care and attention of nurses to wait upon him, or that plaintiff still suffers great or any pain or anguish of body, or that defendant is or will be unable to engage in any employment or attend to his business in consequence of said alleged injuries sustained as in the complaint alleged.

Defendant denies that by reason of said alleged beating, striking, and wounding of plaintiff by defendant plaintiff was or is unable to partake of any food except fluids.

Defendant denies that the plaintiff has been forced or obliged to pay, lay out, or expend the several sums of money in the complaint alleged for physicians, nursing, and medicines by reason of said alleged acts of defendant or by reason of any wrongful or unlawful acts of defendant.

Defendant denies that plaintiff's time in and about his business is of the value of two hundred and fifty (250) dollars per month, or of any value whatever.

11 Defendant denies that by reason of the said alleged wounding and beating of plaintiff by defendant plaintiff has been damaged in the sum of $20,000.00, or in any sum of money whatever.

And defendant, further answering and by way of qualifying the denials hereinbefore made, admits and avers as follows, to wit, that on or about the 30th of March, 1881, at the county of Washoe, State of Nevada, and in a public street of the town of Reno, in said county, and while the defendant was peaceably pursuing his lawful business and calling, the said pl'ff, Sam'l Brown, wholly without just cause and provocation grossly and causelessly insulted the defendant and called the defendant a d—d liar, and wholly without cause or provocation, excuse or justification, advanced upon the defendant in a threatening manner and did assault and attempt to strike and beat the defendant. Wherefore the defendant while the plaintiff was

assaulting and attempting to strike and beat him and in the necessary self-defense struck the plaintiff with his fist, but not otherwise, and from said striking with his fist defendant was knocked down and received some bruises, wounds, and injuries, but not of the character described in the complaint.

Defendant, further answering, avers that the striking this answer specifically set out was not malicious, unlawful, or brutal, but was done under great provocation, and as the defendant at the time believed and now believes was necessary to defend and protect the defendant against the unlawful, unnecessary, and unprovoked assault of the plaintiff hereinbefore alleged.

Wherefore defendant asks to be dismissed hence with judgment for his costs of suit.

R. M. CLARKE AND
PIERCE EVANS,
Def't's Att'ys.

STATE OF NEVADA,
County of Washoe, ss:

J. M. Evans, being duly sworn, deposes and says that he is the defendant named in the foregoing answer; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated upon information or belief, and as to those matters he believes it to be true.

J. N. EVANS.

Subscribed and sworn to before me this 20th July, 1881.

PIERCE EVANS,
Notary Public.

(Endorsed:) In the 2d district court of Nevada, Washoe County. Sam'l Brown, pl'ff. vs. J. N. Evans, def't. Answer. Filed August 3, 1881. R. S. Osburn, clerk, by W. L. Knox, deputy.

Service of a copy of the within answer acknowledged this 3d August, 1881.

LINDSAY & DICKSON,
Att'ys for Pl'ff.

R. M. CLARKE, &
PIERCE EVANS,
Def't's Att'ys.

Filed Sept. 8, 1881.

T. J. EDWARDS,
Clerk U. S. Cir. Court, Dist. Nevada.

United States circuit court for the ninth circuit and district of Nevada.

SAMUEL BROWN
v.
J. N. EVANS.

We, the jury in the above-entitled cause, find for plaintiff and assess

the damages at ($8,150.87) eight thousand one hundred fifty and $\frac{87}{100}$ dollars.

H. S. MASON,
Foreman.

(Endorsed:) U. S. cir. court, dist. Nevada. Sam'l Brown vs. J. N. Evans. Verdict. Filed Nov. 11, 1882. T. J. Edwards, clerk.

15 United States circuit court, ninth circuit and district of Nevada.

SAMUEL BROWN, PLAINTIFF,
v.
J. NEWTON EVANS, DEFENDANT.

This cause came on regularly for trial at the November term, 1882.

The parties appeared in person and by their attorneys of record.

A jury was impaneled and sworn to try the cause; and after hearing the testimony, the arguments of counsel, and the instructions given by the court, and after due deliberation thereon, the jury returned a verdict in favor of the plaintiff for the sum of eight thousand one hundred and fifty dollars and eighty-seven cents.

And the court having ordered judgment to be entered accordingly, it is ordered and adjudged that said plaintiff, Samuel Brown, do have and recover of and from the said defendant, J. Newton Evans, the sum of

16 eight thousand one hundred and fifty $\frac{87}{100}$ dollars ($8,150.87), with interest thereon from this date until paid at the rate of ten per cent. per annum, together with costs of suit, taxed at three hundred sixty-one dollars and forty-four cents.

Dated and entered November 11th, 1882.

UNITED STATES OF AMERICA,
District of Nevada, ss:

I, T. J. Edwards, clerk of the circuit court of the United States for the district of Nevada, do hereby certify that the above and foregoing is a full, true, and correct copy of the original judgment now of record in my office, and that the foregoing and annexed papers constitute the judgment roll in said action.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at my office in Carson City, this the eleventh day of November, A. D. 1882, and in the year of our Independence the 107th.

[L. S.] T. J. EDWARDS, *Clerk.*

(Endorsed:) U. S. cir. court, dist. Nevada. Sam'l Brown v. J. N. Evans. Judgment-roll. Filed Nov. 11, 1882. T. J. Edwards, clerk.

17 *Bill of exceptions.*

In the circuit court of the United States, ninth circuit and district of Nevada.

SAM'L BROWN, PLAINTIFF,
v.
J. N. EVANS, DEFENDANT.

Be it remembered that upon the trial of this cause at the November

term, A. D. 1882, the plaintiff to maintain the issues upon his part introduced evidence tending to show that on the 30th day of March, A. D. 1882, he was attacked by the defendant and was beaten and injured by him in such a manner as to render the said plaintiff insensible, in which state plaintiff remained for, to wit, one hour; by reason of which attack and beating plaintiff's nose was broken and plaintiff's upper jaw was broken and plaintiff was confined to his bed and unable to attend to business for the period of three months, and was compelled to employ a physician at an expense of $300.00 and to hire a nurse at an expense of
18 $71.50, and to procure drugs and medicines at an expense of $29.37, and by reason of which plaintiff suffered great physical pain and mental anguish and indignity, and for the space of ten days thereafter plaintiff's life was in imminent peril by reason of said injuries, and he sustained permanent injuries to his health and body, and by reason of which he lost three months' time, which was worth to him $750.00.

Plaintiff also introduced testimony to show that the assault and beating which he received was cruel, brutal, and unprovoked.

Be it further remembered that the plaintiff further to maintain the issue upon his part, and being sworn to testify as a witness in his own behalf, was examined and testified concerning the financial standing and wealth of defendant, to the effect that defendant was a man of wealth and was worth a large sum of money, to wit, the sum of forty or fifty thousand dollars.

To this evidence the defendant by his counsel objected upon the
19 ground that the same was incompetent and immaterial. The court overruled the objection and admitted the testimony, but only as bearing upon the question of exemplary damages, which at that stage of the case were claimed by plaintiff, and the defendant excepted.

Be it further remembered that upon the trial of the cause the defendant, to maintain the issue upon his part, introduced evidence tending to show that immediately before the blows were given which caused the injuries to plaintiff there occurred a conversation between plaintiff and defendant (defendant then having an iron shovel on his shoulder) about defendant's turning water out of the Countryman ditch so as to flow into the English ditch, which latter ditch plaintiff was then engaged in cleaning out; that in this conversation defendant used the first insulting language, to wit, that he applied the epithet "dam'd liar" to plaintiff, and that plaintiff
20 retorted in kind, whereupon defendant struck at plaintiff with his first, plaintiff warding off the blow; that thereupon defendant struck plaintiff with his fist in the face, knocking him down, and that defendant struck plaintiff twice with his fist while plaintiff was on the ground; that defendant then picked his shovel up from the ground and walked away from plaintiff, leaving plaintiff prostrate on the ground; that one Peterson, who was standing close by, then asked defendant who it was he had had the trouble with, and that defendant replied "it is that dam'd old Englishman."

Whereupon the defendant, meeting the witness Netley, said to said Netley, "You had better go and take your boss home," referring to said plaintiff as Netley's "boss."

The defendant also introduced testimony tending to show that he did not strike the plaintiff with a shovel or instrument of any kind, but struck him with his fist.

That at the time defendant was on his way to a waste gate in the
21 Countryman ditch for the purpose of turning the water out of the ditch, and that plaintiff seeing him, advanced to meet him, and that he had never before spoken to the plaintiff, and that he (defendant) had the right to use the ditch, and had been in the exclusive use of it for several years, and that plaintiff was not using it, and did not claim any right to use it at the time the difficulty occurred; and it was shown by plaintiff's testimony in the case that plaintiff's object in meeting defendant at the time was to remonstrate against defendant's acts in turning the water out of defendant's ditch, whereby it ran into plaintiff's ditch, preventing him from cleaning out his ditch, which he was at the time in the act of doing.

The defendant also gave testimony tending to show that plaintiff received no permanent injuries, but that his wounds and bruises were entirely healed, and that the ailments from which the plaintiff now suffered were the result of chronic asthma and chronic catarrh, contracted
22 prior to March 30, 1881. The defendant being a witness in his own behalf, was asked whether he had ever before had any quarrel or personal difficulty with any person. To this question and testimony, the plaintiff, by his counsel, objected on the ground that it was immaterial and incompetent. The court sustained the objection and defendant excepted. Further, to maintain the issue upon his part the defendant called three witnesses, to wit, Jerry Schooling, C. C. Powning, and A. H. Manning, and offered to prove by each of them that he, defendant, was a peaceable man and that his character and general reputation for peace and quiet in the community where he lived was good. To this testimony the plaintiff, by his attorney, objected on the ground that the same was incompetent and immaterial. The court sustained the objection, and the defendant excepted. The positive, direct testimony fully established the fact of an unlawful assault and beating, and the court afterwards so charged the jury without objection or exception by defendant.

23 At the close of the case and after the testimony was all in, plaintiff, by his counsel, withdrew his claim for exemplary or punitive damages, and the court instructed the jury that plaintiff, having so withdrawn his claim for punitive or exemplary damages plaintiff could not recover anything but compensatory damages and they should not consider the question of exemplary damages and they should not assess any damages except compensatory, which the court instructed the jury included all special damages proved, to wit, for money paid out and expended for medical attendance, services of nurse, cost of drugs and medicines, and value of plaintiff's time lost in consequence of the injury received; also compensation for any injury which plaintiff sustained to his body and health, physical and mental pain suffered, and the indignity put upon his person.

None of the foregoing testimony which was introduced and ad-
24 mitted to the jury was withdrawn from their consideration, nor did defendant request that the same should be done, nor was the attention of the court or jury called to the testimony admitted under objection and exception, nor was any exception taken to said testimony not being withdrawn, or to the failure of the court to allude to it in the charge, nor were the pleadings amended in any particular, nor was any exception taken on that ground, nor were the jury instructed not to consider the

testimony otherwise than as appears by the charge of the court as follows, nor was there any exception on that ground.

Charge to the jury.

SAMUEL BROWN
v.
J. NEWTON EVANS.

GENTLEMEN OF THE JURY: It now devolves upon you to determine the contested issues of fact in this case; fortunately these are very few. In the course that the case has taken some questions have been eliminated out of the case. You are the judges of the facts and all the
25 disputed or contested issues where there is any testimony in conflict. You are the judges of the credibility of the witnesses. It is for you to determine what force and effect should be given to any testimony upon the questions which are submitted for your determination.

In this case I shall have very little to say to you. There will be but a single issue at last for you to determine the real issue upon which there is conflict of testimony.

Now, with reference to what took place at the meeting of these two parties the testimony is substantially the same of all the witnesses in all the substantial matters. Whatever difference there is is in the smaller matters of detail. I was very much pleased and surprised to see how nearly the opposite parties related the substantial facts in this case.

My impression on both sides is that they stated fairly and honestly the facts as they appeared to them. Of course if the impression is dif-
26 ferent upon your own minds you will take your own impression instead of mine. But upon these points taking the facts in the most favorable light in favor of the defendant, taking it upon his own statement, upon the statement of any witness, take it as the result of the testimony of all the witnesses, we instruct you as a matter of law, taking the facts as true in the most favorable light, that he is responsible for this act, that the charge of unlawfully committing the assault and battery is made out.

As a question of law, taking all the facts in the most favorable light for the defendant, it is our duty therefore if you should find otherwise upon that point, promptly to set aside your verdict as not sustained by the evidence and the law. That being established under the repeated rulings of the Supreme Court, I instruct you you should find for the plaintiff on that issue, on the issue of unlawful assault and battery and the liability of the defendant. The only question of fact, then, upon which
27 there is any chance for you to differ is as to the amount of damages that is to be awarded. The complaint is framed and the complainant started out to try the case with the idea of claiming exemplary or punitive damages. He has waived that, however, so that the only question for you to determine then upon the disputed testimony is as to the amount of compensation that shall be awarded for these injuries. Now, the rule of damages is that he shall be compensated for the entire injury he sustained. The amount of your verdict should be sufficient to compensate him fully for the injury sustained, and nothing more. Nothing shall be added for punishment or as exemplary damages.

Now, then, the first items that you are to consider is, what expense he has incurred by reason of this injury.

From the testimony he is entitled to recover these items at least: first, physicians' fee' that amount to $300.00; medicine, $39.37; nurse, $71.50; making an aggregate of $400.87. That amount he is entitled to
28 recover; that is not disputed. Then the next item is he claims $250.00 a month for 3 months' loss of time by reason of this is injury, which would amount to $750. Now, it is claimed by one side that as a question of law he is not entitled to that; that the evidence is insufficient. We find that there is sufficient evidence to go before the jury. It does not matter that he was not working upon a salary. If his time is of that value to him in the management of his business, and he lose that time, then he is entitled to receiv the value of his time during the time that he was unable to perform these duties in consequence of this injury. Now, he has testified that his time is worth $250 a month, and that the time during which he was incapable of performing his duties was 3 months. I believe there is no dispute as to the time, but counsel for defendant do dispute that his time was worth that amount to him. Now, gentlemen, I will leave that to you upon the testimony and all the
29 testimony in the case, you must determine whether he lost three months' time, and, if so, whether it was worth $250 a month, or a less sum. If you are satisfied from the testimony that his time was worth $250 a month, and that he lost 3 months' time, he is entitled to add to the $400.87 the $750, making $1,150.87. If his time was of less value then you fix the value, and add that to the expenses. Now, these items are simply the items of pecuniary loss sustained; they are simply incidental to the main ground of action. There is still left the compensation for the injuries whichhe sustained; that is, the personal injuries. Now, then, you heard the testimony as to what those injuries are. First, there was a breaking down of the bridge of the nose, and a fracture of the upper jaw, with the process in which the teeth are set or extending through that into the solid bone. Of course if it extended through into the solid bone, the injury is more serious than if it was limited to the process. It is for you to determine—you can take your recollection of it—the extent of
30 that injury, whether it was limited to the one or the other, but whichever it is he is entitled to full compensation for that injury sustained. Now, gentlemen, you are to consider that the fracture of the nose, the breaking down the bridge, the fracture of the jaw, and to whatever extent it may have gone, and you are to take the testimony and estimate what you think is a fair, reasonable compensation for such injuries as those. Then you will understand that the testimony tends to show that he was rendered insensible for some time. He bled profusely. The testimony of the witness tends to show that he has since been troubled with a neuralgic affection and there has been ringing in the head. You are to determine whether that state of facts existed, and, if so, whether it was the result of this injury. If it did result from the injury, then those things are to be taken into consideration; or, if his catarrhal affection was induced by this injury then you are entitled to consider that. If these, however, are not the result of the injury, if they are the
31 result of previous disease or some other cause he is not entitled to recover, for these. You are to determine from the whole of the case

whether these injuries resulted from that cause or whether from some other cause.

Now, if in determining the amount to be paid for these injuries you are to consider whether these injuries are temporary or whether they are permanent in character, of course the more permanent they are, the longer they are continued, the greater the damage; the more temporary they are the less the damage. You are to determine whether there are any permanent injuries or not, or whether the injuries are merely temporary, taking the facts into consideration in determining what compensation he ought to receive. Then again, you are to take into consideration the suffering, the physical pain which the plaintiff endured as a consequence of this injury. If he suffered physical pain, as he must have done to some extent, he is entitled to compensation for that pain. You are also entitled to take
32 into consideration his mental suffering and excitement and give compensation for that. You will take into consideration the indignity inflicted upon him by such assault and battery and give compensation for that. These are the elements which you are to consider in making up your verdict as to the amount that should be recovered by this plaintiff against this defendant. Now, gentlemen, there is no positive standard by which you can measure the breaking of the nose or of the jaw; the pain suffered, the indignity inflicted, the mental anguish, &c., are not matters of commercial value. You cannot go into the market and estimate its value in the market; it is something that you have got to exercise your own judgment and discretion upon.

Now, you are to take the question as reasonable men and determine the matter between man and man; between your neighbors; consider what upon the whole you regard as a fair and reasonable compensation for these injuries, and fix such sum as you think may be a full, complete, and
33 adequate compensation for the injury suffered. Now, while on the one hand you are not to be niggardly, on the other hand you are not be extravagant, but looking at it, as I said, as reasonable men, considering it fairly, honestly, considering the oath that you have taken, do justice between the parties and render such a verdict and allow such sum as you think will be a full and adequate compensation for the injury received without adding anything for punishment or exemplary damages. The form of your verdict will be, &c.

No exception was taken to said charge or to any omission to charge upon other points.

And at the argument counsel for plaintiff spoke to the jury, and dwelt upon the alleged brutality of defendant in striking and beating the plaintiff, and the physicial inability and weakness of plaintiff to defend himself against defendant's attack, said argument being in reply to argument of defendant's counsel, justifying or in mitigation of the assault.

34 And now, within the time allowed by law, and the further time granted by the court, upon good cause shown, the defendant presents this his bill of exceptions.

The foregoing bill of exceptions is settled, allowed, and sealed.

LORENZO SAWYER, [SEAL.]
Circuit Judge.

(Endorsed:) In the circuit court of the United States, ninth circuit and

district of Nevada. Sam'l Brown, pl'ff, vs. J. N. Evans, def't. Defendant's engrossed bill of exceptions. Filed Feb'y 26, 1883. T. J. Edwards, clerk.

35 In the Supreme Court of the United States of America.

J. N. EVANS, PLAINTIFF IN ERROR,
vs.
SAMUEL BROWN, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States of the ninth circuit, in and for the district of Nevada, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Samuel Brown, plaintiff, and J. N. Evans, defendant, a manifest error hath happened, to the great damage of the said J. N. Evans, as by his complaint appears; we being willing that the error, if any hath
36 been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the Monday in (A. D. 1883) next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-sixth day of February, in the year of
37 our Lord one thousand eight hundred and eighty-three.

[SEAL.] T. J. EDWARDS,
Clerk of the Circuit Court for the District of Nevada.

38 (Indorsed:) In U. S. circuit court, 9th circuit, district of Nevada. J. N. Evans, plaintiff in error, vs. Samuel Brown, defendant in error. Writ of error. Filed Feb'y 26, 1883. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

39 In the Supreme Court of the United States of America.

J. N. EVANS, PLAINTIFF IN ERROR,
vs.
SAMUEL BROWN, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA, *ss:*

To Samuel Brown, defendant in error:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the ninth circuit, district of Nevada, wherein J. N. Evans is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned
40, 41 should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States this day of February, in the year of our Lord one thousand eight hundred and eighty-three.

G. M. SABIN,
District Judge, holding the Circuit Court of the United States in and for the District of Nevada.

Service admitted this 2d day of March, A. D. 1883.

ROB'T H. LINDSAY,*
Attorney for Defendant in Error.

42 (Indorsed:) In the Supreme Court of the United States of America. J. N. Evans, pl'ff in error, vs. Sam'l Brown, def't in error. Citation. Filed M'ch 2, 1883. T. J. Edwards, clerk U. S. circuit court, dist. Nevada.

43 In the Supreme Court of the United States of America.

J. N. EVANS, PLAINTIFF IN ERROR,
v.
SAMUEL BROWN, DEFENDANT IN ERROR.

Of October term, in the year of our Lord eighteen hundred and eighty-three.

Afterwards, to wit, on the Monday in , in this same term, before the justices of the Supreme Court of the United States, at the capitol, in the city of Washington, comes the said J. N. Evans, by Rob't M. Clarke, his attorney, and says that in the record and proceedings aforesaid there is a manifest error, in this, to wit:

The court erred, to the injury and prejudice of the plaintiff in error, by admitting the testimony offered by the defendant in error and in his behalf to prove the financial standing and wealth of the plaintiff in error, and that the plaintiff in error was a man of wealth and was worth
44 a large sum of money, to wit, $40,000 or $50,000.

The court erred, to the prejudice of the plaintiff in error and to his injury, in denying and excluding plaintiff in error's offer to prove that he had never before had any quarrel or personal difficulty with any person, and that he was a peaceable man.

The court erred, to the prejudice of the plaintiff in error and to his injury, in denying and excluding plaintiff's in error' offer to prove that his character and general reputation for peace and quiet in the community where he lived was good.

* In pencil in original.

The court erred, to the prejudice of the plaintiff in error and to his injury, in admitting testimony to show, and in permitting such testimony to remain before the jury for their consideration, that the conduct of the plaintiff in error in the premises was wanton and brutal and cruel and inhuman.

The court erred in permitting the attorney for defendant in error
45 to discuss to the jury the testimony tending to show the wantonness, cruelty, and brutality, and inhumanity of the act of the plaintiff in error involved in this cause.

The court erred in overruling plaintiff's in error' motion for a new trial upon the ground of newly-discovered evidence, it appearing from the affidavits filed in support of said motion that plaintiff in error did, after the trial, discover new and material evidence which he could not with reasonable diligence have produced at the trial; it appearing also that such new evidence is sufficient in importance to change the result.

And the said J. N. Evans prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

ROB'T M. CLARKE,
Att'y for Plaintiff in Error.

46 (Endorsed:) In U. S. Supreme Court. J. N. Evans, plaintiff in error, vs. Samuel Brown, def't in error. Assignment of error. Filed Feb'y 26, 1883. T. J. Edwards, clerk U. S. cir. court, dis't Nevada.

In the Supreme Court of the United States of America.

J. N. EVANS, PLAINTIFF IN ERROR,
v.
SAMUEL BROWN, DEFENDANT IN ERROR.

Circuit court of the U. S., ninth circuit, dis't of Nevada.

Know all men by these presents that we, J. N. Evans, as principal, and C. Derby, farmer, of Storey County, and A. Evans, farmer, of Washoe County, Nevada, as sureties, are held and firmly bound unto Samuel Brown, of Reno, Nevada, in the sum of sixteen thousand and five hundred
47 dollars, to be paid to the said Samuel Brown, his executors, or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated this 26th day of February, A. D. 1883.

Whereas, the above-named J. N. Evans hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment in the above-entitled action by the circuit court of the United States, ninth circuit and district of Nevada.

Now, therefore, the condition of this obligation is such that if the above-named J. N. Evans shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

J. N. EVANS. [SEAL.]
C. DERBY. [SEAL.]
A. EVANS. [SEAL.]

48 UNITED STATES OF AMERICA,
District of Nevada, ss:

C. Derby and A. Evans, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of sixteen thousand and five hundred dollars over and above all his just debts and liabilities.

C. DERBY.
A. EVANS.

Sworn to before me this 26th day of February, A. D. 1883.

T. V. JULIEN,
Commissioner of United States Circuit Court in and for the District of Nevada.

I approve the above bond and the sufficiency of the sureties thereto.

G. M. SABIN,
U. S. Dist. Judge Presiding.

(Endorsed:) In U. S. Supreme Court. J. N. Evans, pl'ff in
49 error, vs. Samuel Brown, def't in error. Supersedeas bond. Filed Feb'y 28, 1883. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

DISTRICT OF NEVADA, *ss:*

I, T. J. Edwards, clerk of the circuit court of the United States for the said district of Nevada, do hereby certify that the foregoing forty-nine written pages, numbered from 1 to 49, inclusive, are a true copy of the record and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit this 21st day of July, A. D. 1883.

[SEAL.] T. J. EDWARDS, *Clerk.*

50 In the district court, 2d district, Nevada, County of Washoe.

SAMUEL BROWN, PLAINTIFF,
v.
J. NEWTON EVANS, DEFENDANT.

To the honorable the district court of the 2d judicial district, State of Nevada, in and for the county of Washoe:

The petition of Samuel Brown, of Reno, Washoe County, Nevada, repectfully shows that your petitioner is the plaintiff in this suit, and that the same was brought by your petitioner on or about the 18th day of May, A. D. 1881, in the said district court.

And your petitioner further shows that the said plaintiff claims in the summons and complaint in this suit as damages against the said defendant, J. Newton Evans, the sum of twenty thousand dollars, and that the matter in dispute in this suit therefore exceeds the sum of five hundred
51 dollars exclusive of costs.

And your petitioner further respectfully shows that this suit is brought by the said plaintiff against said defendant to recover damages for an alleged assault and battery committed by the defendant on the person of

the plaintiff, and that the said plaintiff is now, and was at the time of the commencement of this suit, an alien; that is to say, a subject of Her Majesty the Queen of Great Britain and Ireland, and that the said defendant is now, and was at the time of the commencement of this suit, a citizen of the State of Nevada.

And your petitioner further respectfully shows that the cause has not yet been tried, but that the same is pending for trial, and that the term of said district court at which said cause could be first tried is the next September term of said court appointed to be held on the 5th day of September, A. D. 1881, at Reno, Washoe County, Nevada; and that your petitioner
52 desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the district of Nevada, in the 9th circuit, in pursuance of the provisions of law as contained in the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts and for other purposes." And your petitioner further shows that the said defendant has duly appeared in said suit by filing his answer therein, in the office of the clerk of said district court, on the 3d day of August, 1881.

And your petitioner further respectfully shows that he is ready and willing to give a bond with good and sufficient surety for his doing all acts and things required to be done by the said provisions of law upon the removal of a cause into the circuit court of the United States, and he offers and files herewith his bond, executed by C. T. Bender and W. R.
53 Chamberlain as sureties, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in the next circuit court of the United States, to be held in the district of Nevada, on the first day of the session of said court, a copy of the record in this suit, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that this suit has been wrongfully or improperly removed thereto, and shall do all such other appropriate acts as by the said acts of Congress are required to be done upon the removal of a suit into the United States court, as good and sufficient surety according to the said provisions of law upon the removal of a suit into the United States court.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the
54 United States, to be held in the district of Nevada, in the 9th circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

(Signed) SAM'L BROWN,
(Signed) LINDSAY & DICKSON,
Attorneys for Petitioner.

STATE OF NEVADA,
County of Washoe, ss:

Samuel Brown, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read said petition, and knows the contents thereof; that the same is true of his own knowl-

edge, except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

SAM'L BROWN.

Subscribed and sworn to before me this 17th day of August, A. D. 1881.

55 [NOTARIAL SEAL.] H. L. FISH,
Notary Public, Washoe County, Nevada.

(Endorsements:) In dist. court, 2d dist. Nev., co. of Washoe. Sam'l Brown vs. J. N. Evans. Petition for removal of cause to U. S. court. Filed Sept. 5th, 1881. R. S. Osburn, clerk, by W. L. Knox, deputy. Filed Sept. 8, 1881. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

56 In the district court, 2nd district, Nevada, county of Washoe.

SAMUEL BROWN, PLAINTIFF,
v.
J. NEWTON EVANS, DEFENDANT.

We, Samuel Brown, of Reno, in the county of Washoe, State of Nevada, as principal, and C. T. Bender and Wm. R. Chamberlain, of the same place, as sureties, are held and firmly bound unto J. Newton Evans, of the same place, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said J. Newton Evans, his successors or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated the 22d day of Aug., A. D. 1881.

Whereas a suit was brought on or about the 18th day of May, 1881, in the district court of the 2d judicial district of the State of Ne-
57 vada, in and for the county of Washoe, by the said Samuel Brown against the said J. Newton Evans, and the same is now pending for trial, and is removable into the circuit court of the United States for the district of Nevada, in the ninth circuit, under the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes"; and whereas the said Samuel Brown has filed his petition in said district court, 2d district, Nevada, in and for the county of Washoe, for the removal of said suit into the next circuit court of the United States to be held in the district of Nevada:

Now, therefore, the condition of the above obligation is such that if the above-bounden Samuel Brown, or his legal representatives, shall enter, or cause to be entered, in the circuit court of the United States for
58 the district of Nevada, on the first day of its stated session next ensuing after the order of the said district court, 2d district Nevada, in and for the county of Washoe, for the removal of said suit into said circuit court, a copy of the record in the said suit, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that this suit has been wrongfully or improperly removed thereto, and shall do and cause to be done such other appropriate acts as by the

said act of Congress, approved March 3, 1875, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) SAM'L BROWN. [SEAL.]
C. T. BENDER. [SEAL.]
W. R. CHAMBERLAIN. [SEAL.]

STATE OF NEVADA,
County of Washoe, ss:

C. T. Bender and Wm. R. Chamberlain, the sureties in the fore-
59 going obligation named, being duly sworn, deposes and says that he is a resident of the State of Nevada, and a householder therein, and is worth the sum of five hundred dollars, over all his just debts and liabilities, and exclusive of property exempt by law from execution.

C. T. BENDER.
W. R. CHAMBERLAIN.

Subscribed and sworn to before me this 22d day of August, 1881.

H. L. FISH,
Notary Public.

STATE OF NEVADA,
County of Washoe, ss:

I certify that on the 22d day of Angust, A. D. 1881, before me personally appeared C. T. Bender, and Wm. R. Chamberlain, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same as their own free act and deed for the uses and purposes therein mentioned.

60 [NOTARIAL SEAL.] H. L. FISH,
Notary Public.

(Endorsed:) In the district court, 2nd dist. Nev., co. of Washoe. Sam'l Brown vs. J. Newton Evans. Bond on removal of cause. Filed Sept 5th, 1881. R. S. Osburn, clerk, by W. L. Knox, deputy.

The within bond is accepted and approved this 5th day of Sept., 1881. Done in open court.

S. D. KING,
Judge of 2d Judicial District, State of Nevada, Washoe County.

Filed Sept. 8, 1881. T. J. Edwards, clerk U. S. circuit, dist. Nevada.

61 EXHIBIT A.

DISTRICT OF NEVADA, *ss:*

In the United States circuit court of said district, begun and held at Carson City on the sixth day of November, A. D. 1872.

Present, honorable Lorenzo Sawyer, circuit judge, and honorable Geo. M. Sabin, district judge, the following proceedings were had and entered of record on the 11*st* day of November, A. D. 1882.

SAM'L BROWN
v.
J. N. EVANS.

This cause having been regularly tried, argued, and submitted, the court now delivered its charge to the jury; and thereupon the jury retired in charge of the marshal to consider their verdict. Subsequently, and after deliberation the jury came into court and presented the following verdict:

"We, the jury in the above-entitled cause, find for plaintiff, and
62 assess the damage at ($8,150.87) eight thousand one hundred fifty and $\frac{87}{100}$ dollars. H. S. Mason, foreman."

It is therefore ordered that judgment be entered herein in accordance with the verdict.

EXHIBIT B.

In the circuit circuit of the United States, ninth circuit and district of Nevada.

SAM'L BROWN, PLAINTIFF,
vs.
J. N. EVANS, DEFENDANT.

Notice of motion for new trial.

The above-named plaintiff and Rob't H. Lindsay, esq., and W. E. F. Deal, esq., attorneys for said plaintiff, will hereby take notice that the above-named defendant will move the court to vacate the verdict and set aside the judgment, and for a new trial of the above cause. Said motion
63 will be made upon the grounds following, to wit:

1. Errors of law accruing at the trial and excepted to by the defendant.

2. Insufficiency of the evidence to justify the verdict, and that is against law.

3. Excessive damages appearing to have been given under the influence of passion or prejudice.

4. Newly-discovered evidence material to the defendant, and which he could not with reasonable dilligence have discovered and produced at the trial.

5. Misconduct of the jury.

6. Mistake of the jury in supposing that nine (9) of their number could find a verdict, two of the jurors in fact being in favor of the defendant and not agreeing to the verdict.

The motion will be made upon the minutes of the court and the pleadings and proceedings on file in the clerk's office; also upon the
64 oral and documentary evidence taken at the trial; also upon affidavits hereafter to be served.

ROB'T M. CLARKE,
Att'y for Defendant.

(Endorsed:) Circuit court of U. S., ninth circuit, district of Nevada. Sam'l Brown, pl'ff, vs. J. N. Evans, def't. Notice of motion for new trial. Filed Nov. 16th, 1882. T. J. Edwards, clerk.

EXHIBIT C.

Minutes of court of date November 16th, 1882.

SAMUEL BROWN
vs.
J. N. EVANS.

On motion of R. M. Clarke, esq., attorney for defendant, it is ordered that execution herein be stayed pending the motion for new trial.

65 EXHIBIT D.

Minutes of court of date November 18, 1882.

SAMUEL BROWN
vs.
J. N. EVANS.

On motion of Mr. Clarke it is ordered that defendant have fifteen days from this date to file and serve his bill of exceptions herein.

EXHIBIT E.

Minutes of court of date December 4th, 1882.

SAMUEL BROWN
v.
J. N. ENANS.

Defendant's motion for a new trial was this day argued and submitted by counsel for the respective parties.

On motion and by consent defendant was given ten days to file his brief herein, and plaintiff five days thereafter to reply.

66 EXHIBIT F.

Minutes of court of date February 5th, 1883.

SAMUEL BROWN
v.
J. N. EVANS.

The motion for a new trial herein having been regularly argued and submitted and duly considered, it is now ordered by the court that the said motion be, and the same is hereby denied.

EXHIBIT G.

In the circuit court of the United States, ninth circuit, district of Nevada.

SAMUEL BROWN, PLAINTIFF,
vs.
J. N. EVANS, DEFENDANT.

To said plaintiff and Rob't H. Lindsay, esq., his attorney:

Please take notice that defendant herein will, on Wednesday, Feb'y 14th,

1883, at 10 o'clock a. m. of said day, at Judge G. M. Sabin's cham-
67 bers, in Carson City, Nevada, move said judge to recall and stay the execution heretofore and on or about Feb'y 8th, 1883, issued in said cause, on the ground that said execution was improperly and improvidently and prematurely issued.

This motion will be made on the papers on file in said cause, and also upon a bond, citation, writ of error, and assignment of errors to be hereafter filed in said cause.

ROBERT M. CLARKE,
Attorney for Def't.

On good cause shown, the time for giving notice of the above motion is hereby shortened to Feb'y 14th, 1883.

G. M. SABIN,
Dist. Judge.

Dated FEBRUARY 9TH, 1883.

(Endorsed:) In U. S. circuit court, ninth circuit, district of Nevada. Samuel Brown vs. J. H. Evans. Notice of motion to stay execution and order. Filed Feb'y 12th, 1883. T. J. Edwards, clerk.

68 EXHIBIT H.

Minutes of court of date February 19th, 1883.

SAMUEL BROWN
v.
J. N. EVANS.

Defendant's motion to recall the execution herein was this day argued and submitted by counsel for the respective parties and taken under advisement.

On motion of defendant's attorney, it is ordered that no further or other execution issue herein until the further order of this court.

EXHIBIT I.

Minutes of court of date February 26th, 1883.

SAMUEL BROWN
v.
J. N. EVANS.

The motion heretofore made in this action by defendant's attorneys to recall the execution issued herein on the 8th day of February, A. D. 1883, having at a former day of the term been argued by counsel for the re-
69 spective parties in support of and in opposition to said motion, and submitted and taken under advisement by the court, and the court being now fully advised in the premises:

It is ordered that said execution be, and the same is hereby, recalled into this court, and said execution is hereby annulled and quashed, it having been prematurely issued.

It is further ordered that the marshal of this court do forthwith release

from seizure and levy any and all property seized and levied upon by him under and by virtue of said execution, and that he deliver said property into the possession of the defendant herein, or to the person or persons from whose possession he may have taken the same or any part thereof; that he refrain from any sale of said property, or any part thereof, so seized and levied upon, and from further advertisement of the same for sale.

That said marshal return said execution into court within five
70 days from the date of this order, with his doings thereunder endorsed thereon.

It is further ordered that, in case the defendant herein shall, within ten days from the date of this order, file and serve his writ of error in this action and give the security by law required, approved by the judge of this court, no further or other execution issue out of this court in this action within said period of ten days; and that the costs of this motion and the costs incurred by the marshal under said execution abide the final determination of this action.

(To which order recalling the execution counsel for plaintiff duly excepted.)

71 EXHIBIT K.

Judgment docket, U. S. circuit court, district of Nevada.

Judgment debtor.	Judgment creditor.	Amount of judgment.		Where entered, page.	When docketed.	Date of appeal.	Judgment of the appellate court.	Date of satisfaction.
		Principal.	Costs.					
Evans J. Newton..	Samuel Brown....	8. 150 87	361 44	306	Nov. 11, 1872	.....	.....	.....

72 EXHIBIT L.

Rules of practice of United States circuit court, district of Nevada.

RULE 23.—NEW TRIALS.

All notices of motions for new trials must be given within ten days after the rendition of the verdict or the decision sought to be set aside, and shall state generally the grounds of the motion, and whether it will be made on affidavits, on the minutes of the court (which for the purposes of this rule shall be deemed to include the notes of the evidence taken by the judge, reporter, or other authorized person), all other testimony in the case, and all rulings made and excepted to in the progress of the trial and the pleadings and proceedings on file in the clerk's office. Whether made upon the minutes of the court and the pleadings and proceedings in the clerk's office or upon the grounds of newly-discovered evidence, or other grounds shown by affidavits, the motion shall be brought on for argument on the first succeeding motion day of the term at which it can be heard after giving notice; and in the latter cases a copy of the affidavits
73 upon which the motion is based shall be served on the attorney of the adverse party two days before said motion day.

RULE 26.—NOTICE OF MOTION TO STAY PROCEEDINGS PENDING MOTION FOR NEW TRIAL.

When judgment has been entered upon the verdict or other decision, notice shall be given to the adverse party of any motion to stay execution thereon.

74 RULE 27.—MOTION FOR NEW TRIAL, ETC., NOT TO DELAY ENTRY OF JUDGMENT.

A notice of motion for a new trial or in arrest of judgment shall not delay the entry and docketing of the judgment, except when proceedings are stayed by order of the court or one of the judges. If the motion be sustained the judgment shall be set aside.

RULE 28.—NO ARREST OF JUDGMENT AFTER NEW TRIAL.

No motion in arrest of judgment shall be heard after a new trial once had; but motions in arrest of judgment and for a new trial may in the first instance be simultaneously made.

RULE 29.—NO WAIVER.

A motion for a new trial shall not be deemed a waiver of any bill of exceptions taken, but a writ of error or appeal taken, pending a motion for new trial or application for rehearing, shall be deemed a waiver of such motion or application.

75 *Minutes of court of date February* 7, 1876.

Present: Honorable E. W. Hillyer, judge.

Ordered that the following order be and the same is hereby entered as of date of December 6th, A. D. 1875.

Ordered that the following rules be, and they are hereby, adopted as the rules of this court; that said rules take effect and be in force from and after the first day of January, A. D. 1876; and that all rules heretofore adopted be repealed, said repeal to take effect on said first day of January.

(Rules 1 to 78, inclusive, are here entered of record.)

76 EXHIBIT M.

In the United States circuit court, 9th circuit, district of Nevada.

SAMUEL BROWN, PLAINTIFF,
v.
J. NEWTON EVANS, DEFENDANT.

The President of the United States of America to the marshal of said district of Nevada, sends greeting:

Whereas on the eleventh day of November, A. D. 1882, the above-named plaintiff recovered a judgment in our said circuit court against said defendant for the sum of eight thousand one hundred and fifty dollars and

eighty-seven cents ($8,150.87), with interest thereon from November 11, 1882, until paid, at the rate of ten per cent. per annum, together with the sum of three hundred sixty-one dollars and forty-four cents ($361.44), costs of suit, and accruing costs now amounting to ten dollars and sixty cents ($10.60), as appears to us of record.

And whereas the judgment-roll in said action was filed and the said judgment docketed in the office of the clerk of said circuit court at
77 Carson City, Nevada, on the 11th day of November, 1882; and the sum of $8,150.87, with interest and costs as aforesaid, is now actually due on said judgment.

Now, therefore, you, said marshal, are hereby required to make said sums due on said judgment with interest and costs as aforesaid, and costs hereafter accruing, out of the personal property of said judgment debtor, J. Newton Evans, and if sufficient personal property cannot be found then out of the real property in your district belonging to him on the day said judgment was docketed as aforesaid, or at any time thereafter, and make due return of this writ within sixty days after recovering the same with your proceedings endorsed hereon.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Washington, this eighth day of February, A. D. 1883, and of the year of our Independence the 107th.

78 Attest, my hand and the seal of said circuit court the day and year last-above written.

[L. S.] T. J. EDWARDS, *Clerk.*

This to certify that I have this day by order of the U. S. circuit court, ninth circuit district of Nevada, caused to be withdrawn the notice of sale of the property of J. N. Evans, to satisfy the within execution, which is hereby returned unsatisfied.

P. S. CORBETT,
U. S. Marshal, Dist. of Nevada.

Dated VIRGINIA CITY, NEV., *February* 26, 1883.

VIRGINIA CITY, *M'ch 2d*, 1883.

Samuel Brown to P. S. Corbett, U. S. Marshal, Dr.

FEES.

To actual expense to & from Reno from Va., 2 days.....	$14 00
Serving copy of execution & notice on Pierce Evans, att'y, &c...	8 00
Serving copy of execution on J. N. Evans	4 00
Making 4 copies of notice, 6 folios each, 20c	4 80
79 Advertising notice of sale in Reno State Journal.....	31 50
	$62 30

To be entered on execution.

(Endorsed:) U. S. cir. court, dis't Nevada. Sam'l Brown, vs. J. N. Evans. Execution. Am't $8,150.87. Int. . Costs 361.44. Cl'k's acc. costs 10.60. Marshal's acc. costs . Filed Feb'y 27, 1883. T. J. Edwards, clerk.

DISTRICT OF NEVADA, *ss:*

I, T. J. Edwards, clerk United States circuit court for said district, do hereby certify that the above and foregoing is a full, true, and correct copy of the following-named papers and records in the case of Samuel Brown, plaintiff, against J. F. Evans, defendant, as the same now remain in my office, viz: Petition and bond on removal, all minutes of court including and subsequent to rendition of the verdict, notice of motion for
80 new trial, notice of motion to recall execution, judgment docket, and execution.

And also of rules 23, 26, 27, 28, and 29, as adopted by said court on the 6th day of December, 1875; and that a true copy of the order adopting said rules is included in the foregoing record.

I further certify that said rules 23, 26, 27, 28, & 29 are all the rules of said court concerning motions for new trials; and, further, that the record in said cause does not show that any order of removal was made by the judge of the State court.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in Carson City, Nevada, this 3d day of September, A. D. 1883.

[SEAL.] T. J. EDWARDS, *Clerk.*

(Indorsement on cover:) No. 949. J. N. Evans, plaintiff in error, vs. Samuel Brown. Nevada C. C. U. S. Filed 12th September, 1883.

4504——3

No 109-188

109-188 IN THE

SUPREME COURT

OF THE

UNITED STATES:

J. N. EVANS,

PLAINTIFF IN ERROR.

VS.

SAMUEL BROWN,

DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

WM. WOODBURN AND
CLARKE & KING,

Attorneys for Plaintiff in Error.

W. E. F. DEAL,

Attorney for Defendant in Error.

Filed , 1883.

Clerk.

Nevada Tribune Print.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

J. N. EVANS,

Plaintiff in Error,

VS.

SAMUEL BROWN,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

I.

The two motions of the defendant in error to dismiss the writ and to affirm the judgment of the Circuit Court are mutually dependent and may be fairly treated together.

The motion to dismiss is made upon the ground of a technical defect in the writ—a clerical omission. The writ is made returnable on the ..... day of ....., 1883. The complaint is of

the failure to fill these blanks. The year being stated, and blank spaces left for stating the exact month and day of the return, the omission to fill these blank spaces is clearly a clerical one, and the Statute provides for the amendment of such writs.

Revised Statute, Sec. 1005.

The amendment must not, however, be to the prejudice of defendant in error.

No delay is occasioned to defendant in error.

It is insisted, however, that defendant will be prejudiced by the allowance of any amendment.

The only suggestion of fact showing such prejudice, is that defendant has made his motion to dismiss and affirm, paid costs and employed counsel.

This, however, is only incident to defendant's several motions, is not occasioned by the clerical omissions of plaintiff, and neither plaintiff's omissions nor the allowance of an amendment curing them can prejudice defendant in error upon the merits.

The prejudice meant is always prejudice upon the final hearing, *i. e.* upon the merits of the case.

This must be so. It cannot mean that the defendant in error is not to be prejudiced (defeated) in his motion based upon the existence of the defect, by amendment obviating the defect of which complaint is made.

To construe it otherwise is to defeat the right of amendment.

The necessity of amendment is always to meet some objection raised (for if not raised the defect is probably waived).

Defendant's argument is that his motion must prevail if the defect is not cured by amendment.

That *he* will be prejudiced in his motion by any amendment, which cures the defect complained of, *ergo* no amendment can be made, and the just corollary is that *no* amendment can ever be made.

Defendant in error says: Plaintiff has blundered or committed a technical error. I have such an interest in that error that the correction of it would be to my prejudice, therefore no amendment to cure this error or omission can be permitted.

It seems to be conceded upon these motions that the one to affirm is to a degree dependent upon the one to dismiss, upon its being well grounded and valid. That there must be some ground of dismissal before the judgment can be affirmed upon motion.

We think the suggestions before made fully dispose of the motion to dismiss.

The converse should be equally true. That when the motion to dismiss is unfounded the motion to affirm should fail, and the merits be considered in the ordinary way.

In support of his motion defendant argues that the record discloses an utter lack of merit—that the writ is sued out for the purposes of delay.

The only cased cited by defendant in error is

Pearson v. Yewdall, *93 U. S.*, where the dismissal was upon the ground that the only questions presented had many times been passed upon by the Supreme Court. There is no pretense that the questions presented in this record have ever been passed upon. The contrary seems to be conceded.

Certainly Pearson v. Yewdall, *supra*, is not *authority* for this motion.

II.

The *first* error complained of by plaintiff in error is the admission of evidence touching the financial standing of the defendant in the action. It was never competent nor admissible in the case.

Punitive damages were not recoverable, as the matter charged against the defendant involved a criminal offense punishable under the laws of the State, and testimony that could only reflect upon such damages was clearly not admissible.

The plaintiff evidently withdrew his claim for such damages because satisfied, upon the authorities, that they were not recoverable.

The testimony complained of was admitted before the abandonment of punitive damages by plaintiff, and was evidently admitted generally in the case in support of plaintiff's cause of action as set out.

The testimony thus admitted was not withdrawn from the jury nor stricken out, and being

worked into the warp and woof of their minds, clearly was never discarded, and was doubtless weighed in determining their verdict.

Upon no other theory can the large figure of the verdict have been arrived at.

No permanent injury, and but small special damage, leaves no possible room for $8,150, except the theory of *punishing a rich man.*

Defendant in error imported the vice into the case, and insisted upon it to the last moment of the investigation.

Defendant in error causing this prejudice to the plaintiff in error, must hold the burden of showing that such prejudice and injury to plaintiff in error was guarded against effectually and beyond controversy. Nothing of the kind is attempted.

III.

The *second* error assigned is the exclusion of the testimony sought to be introduced by defendant touching his character for peace and quiet. This was clearly admissable as reflecting upon the facts in the case.

Plaintiff and defendant both testified, and were the only witnesses immediately at the scene of difficulty.

Defendant testified (contradicted squarely by the plaintiff) that the blows inflicted by defendant upon plaintiff were in self-defense, in avoidance of an attack threatened by the plaintiff.

In this conflicting state of the evidence upon this

most material point, defendant's character for peace and quiet became a most valuable element for the consideration of the jury, reflecting upon the probabilities of this involved transaction.

The testimony was not offered in mitigation, as defendant in error seems inclined to believe.

IV.

The propriety of the action of the Circuit Court in recalling the execution and granting a *supersedeas* is fully sustained by the authorities.

The execution was prematurely issued and levied. The judgment in the case having been suspended by the pending of the defendant's motion for a new trial, which was entertained by the Court and denied February 5, 1883, the time for filing *supersedeas* bond runs from the last mentioned date, and not from the date of the judgment (Nov. 14, 1882).

Rutherford v. Penn. Mut. Life Ins. Co., 1 *Fed. Rep.*, 456.

Bump. Fed. Pr., *p.* 687, *Sec.* 987 *and notes.*

Brockett v. Brockett, 2 *How.*, 238.

R. R. Co. v. Bradley, 7 *Wall.*, 575.

Sage v. Central R. R. Co., 93 *U. S.*, 418, 419.

Hatch v. Coddington, 5 *Blatch*, 523.

(In this last case it is held that the time does not commence to run until the motion for new trial has been disposed of and the Court *thereafter* shall

have filed with the Clerk an order or rule for judgment.)

Doyle v. Wisconsin, 94 *U. S.*, 50.

In writs of error to the State Courts, where, after decision, a rehearing is applied for, the time runs only from the entry of the order denying rehearing.

Green v. Buskirk, 3 *Wall.*, 448.

Brumigan v. Chew, 21 *N. J. Eq.*, 180.

Slaughter House Case, 10 *Wall.*, 273.

It was impossible to furnish the bond until the motion for new trial had been disposed of, because until then the judgment was not final within the sense of Sec. 1007 of the Revised Statutes of the United States. (See cases cited under first point.)

While the motion was pending the judgment was within the absolute control of the Court, and could by it have been set aside at any moment. But "a writ of error has the effect to remove the record into the Court granting the writ, and when the conditions" of the law are complied with, "the jurisdiction of the subordinate Court is suspended until the cause is remanded from the appellate tribunal."

Slaughter House Cases, 10 *Wall.*, 273.

Revised Statutes U. S., *Sec.* 987.

Brooks v. Norris, 11 *Howard*, 207.

As defendant could not give the security until *after filing the writ* (Sec. 1007, *supra*), it follows

that this Court must have been ousted of jurisdiction to rule upon the motion had the bond been filed within ten days from November 14, 1882. Such a construction is unwarrantably narrow, and leads to the absurd consequence of either denying the defeated party his right to be heard before taking the case to the appellate tribunal or depriving him of his right to a stay of execution pending the appeal.

Respectfully submitted,

WM. WOODBURN AND
CLARKE & KING,
Attorneys For Plaintiff in Error.

OCT 4 1883
JAMES H. McKENNEY, CLERK

No.....

IN THE

SUPREME COURT

OF THE

UNITED STATES.

J. NEWTON EVANS,
PLAINTIFF IN ERROR,

VS.

SAMUEL BROWN,
DEFENDANT IN ERROR.

Briefs for Defendant in Error,

In Support of Motions to Dismiss Writ and Affirm Judgment, and to Vacate Supersedeas.

W. E. F. DEAL,
Attorney for Defendant in Error.

Filed.....*1883.*

.....*Clerk.*

VIRGINIA EVENING CHRONICLE BOOK PRINT.

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

J. NEWTON EVANS,
Plaintiff in Error,
vs.
SAMUEL BROWN,
Defendant in Error.

STATEMENT OF FACTS.

This was an action at law brought by the Defendant in Error against the Plaintiff in Error in the Circuit Court of the United States for the Ninth Circuit for the District of Nevada, to recover damages for injuries inflicted by the Plaintiff in

Error upon the Defendant in Error by an unprovoked and brutal assault and battery.

The case was tried before a jury and a verdict was rendered by the jury in favor of the Defendant in Error for $8,150 damages, on the 11th day of November, A. D. 1882, and the verdict was duly recorded in the Minutes of the Court on that day, and the judgment in the Record was, by the Court, ordered to be entered and was entered in the Minutes on that day. No stay of proceedings was asked or made.

See "Exhibit A," annexed to notice of motion to vacate supersedeas.

The Clerk entered and docketed the judgment on the 11th day of November, 1882.

See "Exhibit K."

On the 16th day of November, 1882, the Plaintiff in Error served and filed a notice of motion for new trial under the rules of the Circuit Court.

See "Exhibit B," and rules in "Exhibit L."

On the 16th day of November, 1882, an order was made by the Court staying the execution, pending the motion for new trial.

See "Exhibit C."

On the 4th day of December, 1882, the motion for new trial was submitted.

See "Exhibit E."

On the 5th of February, 1883, the motion for new trial was denied, and no further stay was asked or made.

See "Exhibit F."

On the 8th of February, 1883, execution was issued and placed in the hands of the U. S. Marshal, and the Marshal levied upon the property of the Plaintiff in Error to satisfy the execution.

See "Exhibits I" and "M," and the return of the Marshal thereon.

On the 9th day of February, 1883, Plaintiff in Error gave notice of motion to recall the execution.

See "Exhibit G."

On the 26th day of February, 1883, the Court made an order quashing the execution, releasing the property of the judgment creditor therefrom, and allowing a supersedeas in case the Plaintiff in Error, within ten days from that date, should file and serve his writ of error and give the security required by law. In the event that the writ was served and security given as directed, the Court ordered that no further or other execution issue.

See "Exhibit I."

The Plaintiff in Error, within the ten days, and on the 26th day of February, 1883, served and filed the writ of error, and within ten days gave the security required.

The Defendant in Error caused the record in

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See "Exhibit I."

The Plaintiff in Error, within the ten days, and on the 26th day of February, 1883, served and filed the writ of error, and within ten days gave the security required.

The Defendant in Error caused the record in

his cause to be filed in the office of the Clerk of this Court, and served upon the Plaintiff in Error at Reno, Washoe county, Nevada, notices of his motions, as follows:

First—To dismiss said writ of error, and to affirm the judgment, with damages.

Second—To vacate the supersedeas allowed by the Circuit Court and to reinstate the execution.

These notices, which are on file in this Court, were served at the same time with a copy of this brief upon the Plaintiff in Error, and more than thirty days prior to the time fixed in the notices or submitting the motions.

I.

Points and Authorities in Support of the Motions to Dismiss and the Motion to Affirm, with Damages.

These motions are made under Rule No. 6 and Sub-division 2 of Rule No. 23 of this Court.

The motion to dismiss is made upon the ground that the writ of error was not made returnable upon any day of any term of this Court, nor is the same made upon any day certain.

The writ is made returnable on the —— Monday in ————, 1883, and is not in that particular as

required by law and the rules and practice of this Court.

Sub-division 4 of Rule No. 8 required that this writ of error should be made returnable on the first day of the next term of this Court, that is on the second Monday of October, 1883.

In this writ no day of a month is named, nor is any month named when the writ is returnable.

A writ returnable on any day other than that fixed by this Court is without authority of law and will not bring the case to this Court.

Insurance Co. of the Valley of Va. vs. Mordecai, 21 How., 200.

Castro vs. United States, 3 Wall., 50, and cases there cited.

Under the law and rules of this Court, as they stood at the time when the cases above cited were decided, no amendment could be made to the writ of error; but Section 1,005 of the Revised Statutes of the United States provides that this Court may, in its discretion, allow an amendment of the writ, provided *the Defendant is not prejudiced and the amendment will not injure him.*

The allowance of an amendment is purely a matter of discretion with this Court, unless the

Defendant is prejudiced thereby, or unless the amendment will not injure him.

The Act fixing the second Monday of October as the commencement of the term of this Court was adopted January 24, 1873, and it cannot be claimed that the Clerk or the Plaintiff in Error was ignorant of the law.

This Court allowed an amendment to a writ in a case where the writ was issued about a month after the Act above mentioned was adopted, on the ground that the Clerk who issued the writ was not aware of the change in the time of the commencement of the term.

Hampton vs. Rouse, 15 Wall., 684.

In a later case this Court refused to allow an amendment to the writ, when the Record showed that it was taken for delay.

Pearson vs. Yewdall, 95 U. S., 294.
Hinckley vs. Morton, 103 U. S., 765.
Micas vs. Williams, 104 U. S., 557.

The Court says, in Pearson vs. Yewdall (*supra*): "The question now arises whether the Plaintiff in "Error shall have leave to amend. Section 1,005 "of the Revised Statutes authorizes the Court, in "its discretion, and upon such terms as it may "deem just, to allow an amendment of a writ of

"error when the statement of the parties thereto is "defective.

"The right of a party to amend is not absolute, "but it is to be granted by the Court in its discre- "tion. Whether it should be granted in a particu- "lar case must depend upon the attending circum- "stances.

"In this case we think the amendment ought "not to be allowed.

"We have looked carefully through the Record "and cannot find that any question is presented "which has not been many times decided."

An allowance of an amendment to this writ will however, injure Defendant in Error and will prejudice him.

The motion to affirm is dependent upon the motion to dismiss, and without the latter motion the former cannot be made.

Whitney vs. Cook, 99 U. S., 607.
Hinckley vs. Morton, 103 U. S., 765.
Micas vs. Williams, 104 U. S., 556.

This Court held, in Whitney vs. Cook (99 U. S., 607), that in order to affirm there should appear on the Record at least some color of right to a dismissal.

Here upon its face this writ is a mere nullity.

Upon the Record, as it now stands, the Defendant has the absolute right to a dismissal upon motion. Acting upon that right he has brought to this Court this Record for the purpose of making these motions, and has given notice of his motions, employed counsel and paid costs.

Even though the Court should permit an amendment of the writ, it will not do so to the prejudice of Defendant's motion to affirm, and it will refuse to allow an amendment, as the result might be that Defendant's motion to affirm would be lost.

See cases above cited.

This Court has invariabiy granted the motion to affirm when it was properly united with a motion to dismiss, when it has been manifest from the Record that the writ was taken for delay only, although the Court has denied the motion to dismiss in some of the cases where it has affirmed the judgment.

II.

It is manifest from the Record that the writ of error was taken for delay only.

There are but two alleged errors of the Circuit Court brought up to this Court by the writ for review.

First—The Defendant in Error was permitted

to introduce testimony during the trial, against the objection of the Plaintiff in Error, tending to show that the Plaintiff in Error was a man of means. To this Plaintiff in Error duly excepted.

This testimony was introduced by the Defendant in Error for the purpose of enhancing exemplary damages, and was limited by the Court to that purpose in presence of the jury at the time of its admission; and, before the case went to the jury, in open Court and in the presence of the jury, the Defendant in Error withdrew all claim to exemplary damages. This withdrawal was made in view of the fact that the Plaintiff in Error at the trial requested the Court most urgently to instruct the jury that in this case Defendant in Error could not recover exemplary damages. In accordance with the withdrawal the Court, in its charge to the jury, expressly limited the Plaintiff's recovery to simple compensation for his injuries, and expressly told the jury that they must exclude anything for the punishment of the Plaintiff in Error. The Court did in effect, by its charge, expressly, plainly and clearly withdraw the testimony objected to from the jury. If the Plaintiff in Error wished an instruction more explicit or in different phraseology it was his duty to ask for it. This was not done, so that at the time the instruction was given it was perfectly satisfactory to him. He should not now be heard to complain.

The action was in tort for an assault and battery most brutal in its character and entirely unprovoked. The testimony in the case was of such a character that the Court charged the jury to find for the Defendant in Error, and told them that if they found otherwise it would be the duty of the Court to promptly set aside their verdict.

That the instructions were justified by the testimony may be justly inferred from the fact that no exceptions were taken by the Plaintiff in Error to any part of the charge.

Such an instruction must have been clearly error if the evidence had been at all conflicting upon the material issues of the case, and if there had been any conflict an exception would have been taken.

The charge of the Court was as fair for the Plaintiff in Error as it was for the Defendant in Error. It was all the Plaintiff in Error had the right to hope for. Even by the testimony of the Plaintiff in Error himself, the assault was brutal, was without provocation and without one single mitigating circumstance, either in its commission or in the action of Plaintiff in Error immediately after the assault. His answer in this case put in issue every material allegation of the complaint, and his counsel justified the assault upon the trial of the case.

The Plaintiff in Error cannot be permitted now to complain that the Court below did not do more than it did with reference to the testimony objected to. We cannot see what more the Court could have done with reference to the matter. If more could have been done it was the fault of the counsel for the Plaintiff in Error that it was not done.

Brown vs. Evans, 8 *Sawyer*, 498.

If it was error to admit the testimony, the error was cured by the withdrawal of all claims for exemplary damages by Defendant in Error, and by the instruction of the Court.

The testimony objected to was, however (at the time it was offered), clearly admissible. The testimony tended to show that the Plaintiff in Error was a man of wealth. It was relevant as bearing upon the question of exemplary damages, in that a sum which would punish a comparatively poor man would be a mere bagatelle to a man of large means. In such cases the overwhelming weight of authority is in support of the admissibility of testimony showing the assailant's financial condition.

McBride vs. McLaughlin, 5 *Watts*, 376.
Bell vs. Morrison, 27 *Mississippi*, 68.
38 *Wisconsin*, 300.
Humphreys vs. Parker, 52 *Maine*, 502.
Richards vs. Booth, 4 *Wisconsin*, 67.

Brown vs. Barnes, 39 *Michigan*, 211. *See also note to this case in* 33*d Am. Rep., p.* 377.
McCauley vs. Birkhead, 13 *Ird.*, 28.
Hayner vs. Cowden, 27 *Ohio St.*, 292.
10 *Bush*, 263.
Buckley vs. Knapp, 48 *Missouri*, 153.

The admission of this testimony could not have injured the Plaintiff in Error, as is shown by the amount of the verdict.

The character of the assault and the extent of the injuries to the Defendant in Error are shown by the Record.

A motion for a new trial was made in the Circuit Court upon the ground, among others, of excessive damages, and the motion was decided adversely to the plaintiff in Error.

See "Exhibit B."

Second—The Plaintiff in Error offered, upon the trial, to prove by himself and other witnesses that his character for peace and quietness was good. To this Defendant in Error objected. The Court sustained the objection and Plaintiff in Error duly excepted. This evidence was absurdly irrelevant and immaterial.

The character of Plaintiff in Error had not been

attacked nor in any way put in issue.

The injuries Defendant in Error received at the hands of the Plaintiff in Error were not diminished by the fact that Plaintiff in Error may have been a man of good character as to peace and quietness, nor were they increased by the fact that he may have been of the worst character in those particulars.

The fact that Plaintiff in Error might have been as peaceable and quiet as a lamb did not lessen the damage done to Defendant by the mashing and breaking of his nose, or by the fracture of his jawbone, or by the indignity heaped upon him or the consequent suffering of mind and body.

The probabilities are that the respectability of Plaintiff increased rather than diminished mental suffering. It would certainly be less disgraceful to be struck down upon the public street by a lawless ruffian than by one who stood high in all the qualities of a good citizen.

A malicious slander by the tongue of one whose word has some value is surely more injurious than a similar wrong from one whose character for truth and veracity is bad. In such a case, the better the character of the slanderer, the greater must be the injury.

A seduction or rape committed by one who bore

the character of a Joseph is, in law, just as much injury as a similar wrong committed by a Lothario.

The Record shows that even by the testimony of the Plaintiff in Error himself, the assault was brutal, wanton and without justification or provocation.

There was no substantial conflict upon the main points, and nothing to warrant in the slightest degree any mitigation of damages.

Abbott's Trial Evidence, p. 650, *and authorities there cited.*

The authorities are all to the effect that testimony as to the good character of the assailant in such a case is inadmissible.

1 *Greenleaf Ev., S.* 54, *S.* 55.
2 *Greenleaf Ev., S.* 269,
Field on Damages, p. 428.
15 *Central Law Journal, p.* 428.

III.

It may be claimed that the questions raised by the Record in this case have never yet been determined in this Court and that, therefore, the Court will refuse to affirm the judgment upon motion, but will determine the case when it comes upon its merits. Is it possible that every litigant has the right and power to bring his case here and

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keep it here until it is disposed of upon its merits, simply because the legal principle involved may never have been determined in this Court, no matter how trifling they may be, or however well settled the questions involved may be?

If that be so, then all that would be necessary to secure delay and consume the time of this Court would be for a party to an action to make a record by raising some question in the lower Courts that has been well settled by other Courts, but that has never been determined in this Court. If this be so, then the inquiry of this Court upon these matters would be limited to ascertaining (1) whether a bill of exceptions has been allowed in the lower Court, (2) whether the question has ever been decided here, and (3) whether the case is brought properly here upon a writ of error or appeal, as the case may be.

If this be so, then the case must be determined upon its merits, no matter how well settled the questions may be nor how absurd and trifling they may appear upon examination, if the matters have never before come before this Court.

The writ of error here brings to this Court for review but two rulings of the Court below which are claimed to have been erroneous.

As to the first, the almost unanimous decisions

of the Courts sustain the action of the Court below, and the Record shows that even if the ruling was erroneous the error was cured by a withdrawal by the Defendant in Error of all claim for exemplary damages, and also by the charge of the Court, in excluding everything from the consideration of the jury except those matters which entered into a simple compensation to Defendant in Error for the injuries sustained.

As to the second, the authorities are all one way. The evidence offered was clearly irrelevant and immaterial, and that to an absurd degree. How absurd is immediately apparent, when the Court considers the fact that all claim for *punitive* or exemplary damages had been withdrawn, and the action, as determined by the jury, was one for compensation merely.

IV.

DAMAGES SHOULD BE AWARDED THE DEFENDANT IN ERROR.

The Plaintiff in Error, by conforming to the forms of the law, has been enabled to bring this case to this Court by a writ of error, and will be enabled to delay the payment of a just judgment against him for nearly a year.

He has been enabled to do exactly what this

Court has attempted to discourage and prevent by its rules.

A mere affirmance of the judgment will, it is true, enable the Defendant in Error to collect his judgment sooner than he could do if the case were to be determined on its merits, but what punishment will that be to the Plaintiff in Error for trifling with the means provided by law for the furtherance of justice? He will have to pay just exactly what the Defendant in Error is entitled to receive by his judgment, and not one cent more. We, therefore, say that this Court should award to the Defendant in Error such damages as will compensate him, and as will punish the Plaintiff in Error for abusing this writ, and as will deter others from pursuing a course which has so often been reprehended by this Court.

The Court says, in Whitney vs. Cook (99 U. S., 607): "Our experience teaches that the only way "to discourage frivolous appeals and writs of error "is by the use of our power to award damages, and "we think this is a proper case in which to say "that hereafter more attention will be given to that "subject and the rule enforced, both according to "its letter and spirit. Parties should not be sub-"jected to the delay of proceedings for review in "this Court without reasonable cause, and our

"power to make compensation to some extent for "the loss occasioned by an unwarrantable delay, "ought not to be overlooked."

V.

Points and Authorities in Support of Motion to Vacate Supersedeas.

The motion to vacate the supersedeas allowed in this case by the Circuit Court is made upon the following grounds:

First—The Circuit Court had no legal right to make any of the orders set forth in the minutes of the Court of February 26, 1883. ("Exhibit I.")

Second—The Plaintiff in Error did not serve the writ of error nor give the security required by the Act of Congress within the time required by Section 1,007 of the Revised Statutes, so that the writ of error could be a supersedeas.

Third—The Plaintiff in Error having failed to serve his writ of error, and having failed to give the security required by law within sixty days (exclusive of Sundays) after the rendition of the judgment in this action, the writ of error was not and could not be a supersedeas.

Revised Statutes of the United States, Sec. 1,007.

As has been already stated, this was an action

at law and was tried before a jury.

The jury rendered a verdict on the 11th day of November, 1882, and the verdict was entered in the minutes of the Court on that day.

At the time the verdict was entered the Court made an order, which was immediately entered in the minutes, directing a judgment to be entered in accordance with the verdict.

See "Exhibit A," annexed to notice of motion.

The highest Courts of the different States where statutes are in force allowing appeals from judgment within certain times after the *rendition of judgments*, hold that as soon as the order for judgment is made in Court and entered upon the minutes that the judgment is rendered; that that constitutes the *rendition* of a judgment.

Fleet vs. Youngs, 11 *Wend.*, 525.
Gray vs. Palmer, 28 *Cal.*, 416.
Peck vs. Courtis, 31 *Cal.*, 209.
Genela vs. Relyea, 32 *Cal.*, 159.
Wetherbee vs. Dunn, 36 *Cal.*, 252.
Harris vs. S. F. R. R. Co., 41 *Cal.*, 407.
McLaughlin vs. Dougherty, 54 *Cal.*, 519.
Thomas vs. Anderson, 55 *Cal.*, 45.
L. New Albany, etc., R. R. Co. vs. Boland, 70 *Ind.*, 596.

Anderson vs. Mitchell, 58 *Ind.*, 594.

King vs. Higgins, 3 *Oregon*, 413.

State ex rel. Park vs. Lewis, 71 *Mo.*, 171.

And the same appears to be the decision of this Court.

Board of Commissioners vs. Gorman, 19 *Wall.*, 665.

The Clerk, however, in this case entered and docketed the judgment on the 11th day of November, 1882.

See "Exhibits J" and "K."

No stay of proceedings was asked for or made. The Plaintiff in Error, on the 16th day of November, 1882, filed his notice of appeal, under the rules of the Circuit Court, and the Court on that day made an order staying the execution, *pending* the motion for new trial.

See "Exhibits B," "C" and "L."

On the 5th day of February, 1883, the Court denied the motion for new trial, and no further stay of the execution was asked or made.

See "Exhibit F."

On the 8th day of February, 1883, execution was issued upon the judgment, and the United States Marshal proceeded to levy upon and adver-

tise for sale the property of the Plaintiff in Error to satisfy the execution.

See "Exhibits G," "H," "I" and "M," and the Marshal's return on the execution.

On the 26th day of February, 1883, the Circuit Court made the orders set forth in "Exhibit I," and allowed a supersedeas, upon compliance with the conditions of the order by Plaintiff in Error.

Plaintiff in Error served his writ of error on the 26th day of February, 1883, and on the 28th day of February, 1883, gave the security set forth in the Record, which was approved by the Judge of the Circuit Court.

As will be seen, the writ of error was not served until the 26th day of February, 1883, ninety-one days (exclusive of Sundays) after the rendition, entering and docketing of the judgment, nor was the security given until ninety-three days (exclusive of Sundays) after such rendition, entering and docketing.

The allowance of a supersedeas by the Court was in plain violation of Section 1,007 of the Revised Statutes.

That Section required that the writ of error should be served within sixty days (exclusive of Sundays) after the rendition of the judgment, and it also required that the security should be given

within the same time, in order that the writ should be a supersedeas. After that time elapsed the Circuit Court had no power to allow a supersedeas.

"A supersedeas is a statutory remedy. It is "only obtained by a strict compliance with all the "required conditions, none of which can be dis- "pensed with. (Hogan vs. Ross, 11 How., 297. "Railroad Company vs. Harris, 7 Wall., 575.) "Time is an essential element in the proceeding, "and one which neither the Court nor the Judge "can disregard. If a delay beyond the limited time "occurs the right to the remedy is gone, and the "successful party holds his judgment or decree, "freed and discharged from this means of staying "proceedings for its collection or enforcement. "This is a right which he has acquired and of "which he cannot be deprived without due pro- "cess of law."

Sage vs. Central R. R. Co., 93 *U. S.*, 417.

It was not within the power of this Court to allow a supersedeas in this case after the expiration of the sixty days (exclusive of Sundays) after the rendition of the judgment.

This Court say, in Randolph vs. Kitchen (93 U. S., 92): "We are, therefore, of the opinion that "under the law, as it now stands, the service of a "writ of error or the perfecting of an appeal within

"sixty days (exclusive of Sundays) after the ren-
"dering of the judgment or the passing of the
"decree complained of, is anind ispensable pre-
"requisite to a supersedeas, and that it is not within
"the power of a Justice or Judge of the Appellate
"Court to grant a stay of process on the judgment
"or decree if this has not been done."

The Circuit Court, however, held that the time for serving the writ and giving the security did not commence to run until the motion for new trial was denied on the 5th day of February, 1883, following the decision of Justice McCreery (reported in 1st Fed. R. 456), and decisions of this Court in equity cases.

Brown vs. Evans, 8 *Sawyer*, 503.

The Circuit Court held that the motion for new trial suspended the judgment until the motion was determined, and that the effect of making the motion for new trial in an action at law was the same as that of a motion for a rehearing or motion to set aside or modify a decree in equity at the term when the decree is rendered.

We claim that there is no analogy between motions for new trial in actions at law and motions for rehearing or motions to set aside decrees in equity.

The Statutes and Rules in Equity (which are of

equal force with the Statutes when not inconsistent with them) regulate equity practice.

See Section 917, *Revised Statutes.*

Under Equity Rule No. 88 a party has until the end of the term at which a decree is entered to move for a rehearing, and the decree is not final until the end of the term or until the motion is determined by the Court.

Brockett vs. Brockett, 2 *How.*, 238.

R. R. Co. vs. Bradley, 7 *Wall.*, 578.

Memphis vs. Brown, 4 *Otto*, 717.

Section 978 of the Revised Statutes and rules of the Circuit Court in conformity therewith regulate the practice with reference to new trials, and no warrant of law can be found outside of that Section and outside of Section 1,007 to authorize any stay of execution upon judgments at law.

The rules of the Circuit Court set forth in "Exhibit L" regulate the practice upon motions for new trial in the Circuit Court of the Ninth Circuit, District of Nevada. The adoption of those rules was an exercise of the discretion of that Court, under Section 987.

In this case the Plaintiff in Error followed the rules of practice, and the Court made an order

staying execution merely pending the motion. When the motion was denied there was no further stay granted.

The order of the Court of November 16, 1882, was without authority of law. A stay of the execution could only be had by a compliance with Section 987, but no provision of that Section was complied with.

No petition for a new trial was filed, no security was given as required. The Court did not make any certificate allowing a petition to be filed.

The Plaintiff in Error obtained a stay of execution for over ninety days without giving any security whatever, and without any warrant of law or rules of the Court.

The rules of the Circuit Court provide that a notice of motion for new trial shall not delay the entry and docketing of the judgment, except when proceedings are stayed by the order of the Court or one of the Judges (Rule 27 in "Exhibit L"), but, as will be seen, no stay was asked and none was made, but the Court at once ordered the judgment to be entered, and it was entered and docketed accordingly.

The rules of the Circuit Court provided for a speedy mode of determining a motion for new trial—nothing was required to be filed except a

notice stating generally the grounds of the motion and what it would be made on. The plaintiff could have brought his motion on for hearing on the first Monday of December, 1882, and it could have been speedily determined; but whether it could have been or not, the Court was not authorized to stay the execution without security. That was just as essential under Section 987 as it was under Section 1,007.

It might be convenient for litigants to have a motion for new trial suspend a judgment at law until the motion is determined.

It might result that a defendant would lose his right to a supersedeas by moving for a new trial in a case where the motion is not determined until the time for serving the writ of error, so as to be a supersedeas, expired; but are not these considerations to urge upon Congress to change the law, rather than for the Courts to change a positive law by construction against its plain provisions?

The law gives a party the right to move for a new trial, and it also gives him the right to have execution stayed by a compliance with the provisions of Section 987 or the rules of the Circuit Court under that Section.

He may, however, lose the right to have any

further stay of execution beyond the time permitted by that Section.

Section 1,007 gives a defendant the right, also, to have a stay of the execution until a determination of his case in this Court, by serving the writ of error within sixty days after the rendition of judgment, and by giving the security required by law within the time provided. He will, however, lose the right to a supersedeas by failing to serve the writ within the time prescribed.

The Plaintiff in Error had the right to choose which of the two courses he would pursue, whether to move for a new trial, or to take the case to this Court by complying with Section 1,007. He did decide to move for a new trial, and lost the right to a supersedeas, as he did not serve his writ in time.

"The *argumentum ab inconvenienti* will not "change or alter the law when it appears to be so, "but it is only to prove and interpret the law when "we are in doubt, whether it be so or no."

Bacon's Abridgement, Baron and Feme (*H.*), *Vol.* 2, *page* 42.

The inconvenience on the other side also outweighs any inconvenience to the Plaintiff in Error.

The object of Congress in enacting Section

1,007 was evidently, among others, that a judgment creditor should have security for his judgment, in addition to his lien upon the realty of the judgment creditor, in case the defendant desired a stay of execution.

As soon as the judgment was entered and docketed in this case it was a lien, under the Act of Congress and under the Statutes of Nevada, upon all the real estate of the Plaintiff in Error in the State of Nevada.

Sec. 967 *Revised Statutes of the U. S.*

Sec. 1,267, *Vol.* 1, *Compiled Laws of Nevada.*

But if this were the only security provided for the judgment creditor he would have no security whatever if the judgment debtor owned no real estate, or inadequate security if his real estate was not sufficient to pay the judgment.

The judgment debtor would have it in his power to take himself and his personal property out of the jurisdiction of the Court, or to put it out of the power of the judgment creditor to make the amount of his judgment, by disposing of his personal estate.

No such inconvenience could ordinarily happen in an action in equity, and Congress has acccordingly provided that execution shall not be stayed

at all when a motion for new trial is made, without security, and that in order that a writ of error should be a supersedeas, it must be filed within sixty days after rendition of judgment and security given as required by the Statute.

Under the 23d Section of the Judiciary Act of 1789, in order that a writ of error might be a supersedeas it was necessary that the writ should be served within ten days (Sundays exclusive) after rendering the judgment or passing the decree, and that the security should be given within the ten days prescribed for the service of the writ.

Telegraph Co. vs. Eyser, 19 *Wall.*, 426.

The Court say: "Such was originally the state "of the law upon this subject. It frequently sub- "jected parties to great inconvenience and some- "times to serious injury.

"If this writ were not served and the bond "given within ten days from the rendition of the "judgment or decree, the defendant, if it were for "money, was liable to be compelled to pay, although "he might ultimately be victor in the litigation.

"In such case he would be out of the use of his "money in the meantime and finally be compelled "to take the chance of getting it back, perhaps by "further litigation. The facts and the law might

"be for him and yet the money lost. If real estate "were involved he was liable to be turned out of "possession and to lose all benefit from the prop- "erty during the same period.

"It was frequently impossible to serve the writ "and give the bond within the ten days, though "both might readily have been done if more time "were allowed."

It is remarkable that with all these inconveniences no one, until recent times, so far as the decisions show, ever resorted to the device of moving for a new trial and thereby suspend the judgment until a convenient time arrived for giving the security.

Under the Act of 1872 the filing of the bond within sixty days from the time of the entry of the judgment, although it might operate as a supersedeas, would not interfere with what had already been done.

Board of Commissioners vs. Gorman, 19 *Wall.*, 664.

It has never been decided in this Court, so far as I have been able to discover, that a motion for a new trial has the effect given to it by the Circuit Court in this case, and with due respect to that

Court, its decision is not supported by the decisions of this Court in the equity cases cited, as those cases are the necessary consequence of the equity rules and practice of the Federal Courts, and the mode and practice as to new trials in those Courts are regulated and governed by a positive Statute, which has not been followed in this case.

Respectfully submitted,

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